UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, vs. GORDON J. COBURN, STEVEN SCHWARTZ, Defendant.	.	Case No. 19-cr-120 Newark, New Jersey August 9, 2023

TRANSCRIPT OF RECORDED OPINION
BY THE HONORABLE MICHAEL A. HAMMER
UNITED STATES MAGISTRATE JUDGE

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APPEARANCES:

For the Government: No one was present

For the Defendant: No one was present

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(Commencement of proceedings)

THE COURT: Presently before the Court is the United States v. Gordon Coburn and Steven Schwartz, Criminal No. 19-120.

This Report and Recommendation will address the privilege disputes between Defendants Gordon J. Coburn and Steven Schwartz, on the one hand, and nonparty Cognizant Technology Solutions Corporation ("Cognizant") on the other, pursuant to the May 18, 2023, Order of the District Court. [D.E. 481]. Those disputes are presented in a series of filings, including the following briefs, memoranda, and exhibits attached thereto: (1) Defendants' Moving Brief, D.E. 486; (2) Cognizant's Brief in Opposition, D.E. 488; (3) Defendants' Reply Brief, D.E. 491; (4) Defendants' July 19, 2023, Letter D.E. 494; (5) Cognizant's July 24, 2023, Letter, D.E. 496; (6) Defendants' July 31, 2023, Letter; and (7) Judge McNulty's August 2, 2023, Order, D.E. 498.

This Court issues this Report and Recommendation under seal in view of the fact that many, if not most, of the briefs and exhibits have been filed under seal. The parties will then meet and confer on a mutually agreeable redacted version of the Opinion and submit same to the Court within 21 days of its issuance.

Because Defendants, Cognizant, and the Government

are well familiar with the extensive background and litigation history of this matter, as well as Judge McNulty's prior rulings concerning the subpoenas issued to Cognizant, the Court will proceed directly to the privilege disputes before it and will address the litigation history and Judge McNulty's prior rulings only as pertinent to resolution of the disputes.

In their moving brief, the Defendants identify three categories of documents at issue:

1. Documents and communications for which Cognizant's privilege log shows that no privilege ever attached (nearly 7,000 entries). Defendants argue documents within this first category fall into one of four sub-categories, as follows:

   (A) Documents and communications that do not reflect the participation of a lawyer;

   (B) Documents and communications that demonstrate that a lawyer was copied on the communication but was neither a sender nor a recipient thereby showing that no legal advice was conveyed;

   (C) Documents and communications for which the subject-matter line does not indicate the provision or receipt of legal advice; and

   (D) Documents and communications that included a third party, which Defendants assert vitiated the

privilege.

2. The second category of documents concern those for which Defendants assert Cognizant disclosed the pertinent subject matter to the Government in the course of cooperating and thereby waived the privilege. Defendants assert that documents in this second category include:

(A) Documents and communications concerning Cognizant's efforts to obtain the KITS planning permit alleged in the indictment;

(B) Documents and communications regarding other bribes that Cognizant allegedly paid in India but which are not charged in the indictment; and

(C) Documents and communications concerning Cognizant's Foreign Corrupt Practices Act ("FCPA") policies, of which the Defendants are accused in Count 12 of the Indictment with circumventing or otherwise violating.

(3) The third category of documents at issue are those that, the Defendants assert, demonstrate their active assistance in and cooperation with Cognizant's internal investigation. For these documents, the Defendants assert that at the Garrity/Brady hearing before Judge McNulty, Cognizant's outside counsel, Karl Buch, Esq.,

acknowledged the existence of documents that Cognizant had not produced showing the Defendants' cooperation with the internal investigation. As will be discussed herein, during that hearing, Mr. Buch testified that Cognizant had not produced those documents based on the attorney-client privilege.

Cognizant contends that a categorical approach to considering these privilege issues is unworkable, and that the Court must conduct a "document-by-document in camera review." See, e.g., Cognizant's Opposition Brief, D.E. 488, at 10, 22. Cognizant also requested an additional thirty days to provide an in camera brief explaining why it withheld each of the challenged documents. Id. at 22.

The Court disagrees with Cognizant that only a document-by-document in camera review is appropriate to resolve these disputes. First, the Court does not rule on a blank slate. The parties have litigated these privilege issues for well more than two years, and the District Court, itself through a largely categorical review, has issued a series of comprehensive rulings that define the scope of production under Federal Rule of Criminal Procedure 17 and the scope of Cognizant's waiver. Moreover, Cognizant provides scant authority for the proposition that an in camera review is necessary whenever privilege is in dispute.

In fact, in camera review is generally discouraged as a first-resort option. See, e.g. Bogosian v. Gulf Oil Corporation, 738 F.2d 587, 595 (3d Cir. 1984) (noting that although certain situations require in camera review, "[w]e do not generally encourage extensive in camera examination of documents by the district court."). The Court has broad discretion in devising the procedure to resolve a subpoena dispute, including where privilege is an issue. Take, for example, Greene v. Philadelphia Housing Authority, 484 F.App'x 681, 682 (3d Cir. 2012). In that case, Greene, the former executive director of the Philadelphia Housing Authority, appealed the district court's order denying a preliminary injunction preventing the release of invoices for legal services for matters in which he was sued individually and represented by counsel paid by the Authority. Greene contended that the invoices were protected by the attorney-client privilege and that the district court should have conducted an in camera review of the invoices. Id. at 684. The Third Circuit held that there was no abuse of discretion in the district court not conducting such in camera review and affirmed the district court's holding. The Third Circuit noted that "a district court has broad discretion in fashioning a process that enables a fair adjudication of the challenge to a subpoena while maintaining control of its docket and making efficient use of its scarce

resources." Id. at 684-85. Given the thousands of entries at stake in the Greene case, the Third Circuit held that the district court had no duty to conduct a "laborious in camera review" because there were many other methods the court could use to resolve the dispute. Id. at 685.

In this case, the Court is satisfied that an in camera inspection of all documents is neither necessary nor appropriate. Using many of the documents that Cognizant submitted in camera as part of this dispute, and with the benefit of Judge McNulty's extensive rulings and the parties' submissions, the Court can fairly resolve nearly all of the disputes raised in the Defendants' application. In those instances that require an in camera inspection, the Court has noted as much and has provided a schedule for both the in camera inspection and a further opportunity for the parties to be heard.

Category One

The first category of documents in dispute concerns those for which Defendants assert privilege has never attached. At the outset, the Court notes that although the Defendants argue that the relief they seek in this application is necessary to enforce Judge McNulty's rulings concerning Cognizant's waiver of privilege, see, e.g., Defendants' Moving Brief at 17, the Defendants themselves tacitly admit that this first category is outside that scope.

See id. ("First, and before addressing the issues of waiver, the Court should address Cognizant's claims of privilege that are not, and have never been, privileged.").

In any event, the Defendants assert that Cognizant has refused to produce a number of documents that have never been privileged. This category includes communications that do not involve lawyers, for which there are approximately 1,375 entries on Cognizant's privilege log. One such example that Defendants cite is an April 29, 2016, email from Srimanikandan Ramamoorthy to Gordon Coburn that also copies Sridhar Thiruvengadam. Neither Mr. Ramamoorthy nor Mr. Coburn nor Mr. Thiruvengadam is a lawyer. The email forwarded a text message that Mr. Ramamoorthy stated he had received on his personal cell phone. Cognizant refuses to produce the document, claiming that it is attorney-client-privileged because it involves the exchange of legal advice on a non-FCPA compliance issue.

Defendants protest that there are no lawyers included in the email and nothing about the subject line of the communication, which merely involves forwarding a text message received on a personal mobile cell phone, suggests the purpose of the communication was to solicit or receive legal advice.

This category of documents also includes communications that involve lawyers but, Defendants contend,

those lawyers either held non-legal roles in Cognizant or were acting in non-legal capacities. In this subcategory, by way of example, Defendants recite an email exchange concerning requests from PricewaterhouseCoopers from January 28, 2015, to February 23, 2015, for documentation that Cognizant employees had received and complied with Cognizant's codes of conduct.

The email exchange includes PricewaterhouseCoopers' ("PwC") request for documentation that thirty Cognizant employees had received and confirmed compliance with the codes of conduct, which communication is unredacted. It also includes a response from Cognizant's assistant vice president for compliance (Misty Pederson) providing the documentation. This communication too is unredacted. It also includes a communication in which PricewaterhouseCoopers forwards the documentation to Nael Qasem, Cognizant's associate director for internal audit. Qasem then forwarded that material to Cognizant's compliance manager and copies various people, including the PwC auditor. Lakshmi Vipin, Cognizant's compliance manager, then replied to that email. The latter communications, specifically PwC forwarding the documentation to Qasem and Qasem forwarding the documentation to Vipin, as well as Vipin's response, are redacted. Defendants protest that the unredacted portion gives no indication that these communications involve the solicitation or provision of legal

advice. Instead, they contend that it mostly appears that Qasem was trying to get Vipin's help in procuring the compliance documentation.

Defendants also point to an email exchange between Defendant Schwartz and others, dated February 23, 2015, to February 24, 2015, concerning "CKC space for CS" -- i.e., space within the KITS facility. In the first email, Ramamoorthy communicated with Henry Shiembob, Cognizant's vice president and chief security officer. Ramamoorthy told Shiembob that space should be available for the corporate security team by June. In the second email, which is redacted, Shiembob replied to the full thread. In the third email, which is also redacted, Shiembob replied only to Defendant Schwartz. And in the fourth email within the thread, which also is redacted, Defendant Schwartz responded to Shiembob.

For this email exchange, the Defendants contend that if, as it appears, the parties to the email exchange discussed merely finding space for corporate security, it should not matter that Steven Schwartz is a lawyer because in that instance, Steven Schwartz was not acting there as a lawyer in the sense of giving legal advice.

Still another subcategory within Category 1 are communications where the lawyer was merely copied but was neither the sender nor a principal recipient. As an example,

the Defendants point to January 6, 2014, communications regarding "KITS -- Planning Permit Request Letter Reg." Lawyers are merely copied on the those January 6, 2014 communications, and are not the senders or principal recipients. Defendants contend that merely copying a lawyer on an email does not constitute the sort of active participation in providing legal advice that is necessary to give rise to the attorney-client privilege. See, e.g., Dejewski v. National Beverage Corporation, 2021 WL 118929, at *1 (D.N.J. January 12, 2021) ("An email is not deemed to be privileged if an in-house attorney ... did not actively participate in providing legal advice as part of that email.... 'Merely cc'ing an email to an attorney is clearly insufficient to establish the privilege.'") (Internal citation omitted.) Further, the Defendants argue that if some other part of that email thread includes legal advice or references such legal advice, the redaction should be limited to that portion, and the remainder should be produced. Defendants continue that Cognizant cannot simply withhold communications in their entirety, nor took an active role in the communications.

The final subcategory within Category 1 are communications where some third party, often Larson & Toubro Construction ("LT"), was the sender, the recipient, or was copied. As an example, the Defendants recite two June 30,

2015, email communications that were sent to L&T employees and that copied other L&T employees. Cognizant withheld those communications on the basis that the communications involved legal advice on "permit/license issue" or "contract/agreement issue."

Cognizant contends that Defendants have had years to raise this issue. This argument is not without some appeal. After all, the Government produced the Voluntary Productions Log and the DOJ Subpoena Log (i.e., the privilege logs that Cognizant served on the Government when providing documents) to the Defendants in June 2019. Further, Cognizant produced documents responsive to the Category A subpoena in 2021 and provided the Category A Log to the Defendants in March 2021 and April 2021. Defendants did not raise the issue then. Further, Defendants did not raise the issue reasonably soon after Cognizant supplemented its production to comply with Judge McNulty's rulings in 2022, and timely updated its privilege log. Further, Cognizant produced documents responsive to the Category B subpoena and Category B Log by September 2022.

The attorney-client privilege, and for that matter, the work product doctrine, can apply where a lawyer is neither a sender nor a recipient. For example, it is well established that within a corporation, communications between nonlawyer employees or officers that relay information,

advice, or instructions from attorneys, such as to implement the advice or instructions of counsel, may be privileged. In fact, federal courts have long recognized that corporate clients may require the assistance of nonattorneys to gather factual information necessary for the provision of legal advice and representation, and to execute the legal advice once it has been conveyed to the company. See, e.g., Upjohn Company v. United States, 449 U.S. 383, 394 (1981) (holding that the attorney-client privilege extends to communications by a corporation's employees to legal counsel, at the behest of the corporate superior, where the communication was to secure legal advice from counsel); Westinghouse Electric Company v. Republic of Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991) ("When disclosure to a third party is necessary for the client to obtain informed legal advice, courts have recognized exceptions to the rule that disclosure waives the attorney-client privilege.").

Further, the Supreme Court has recognized that in the corporate context, employees other than executives and counsel may have relevant information to assist in the application or formulation of legal advice. For example, the Upjohn court stated, "Middle-level -- and, indeed, lower-level -- employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees

would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties." Upjohn, 449 U.S. at 391. Other federal courts have similarly found that the attorney-client privilege extends to communications by corporate employees where needed to formulate or effectuate legal advice. See, e.g., Faloney v. Wachovia Bank, 254 F.R.D. 204, 211-12 (E.D. Pa. 2008) (finding that the attorney-client privilege applied to communications by bank officials in providing facts to bank's in-house counsel); Littlejohn v. Vivint Solar, 2018 WL 6700673 at *2 (D.N.J. Dec. 20, 2018) (noting the communications between non-attorney employees may still be privileged if they "assist the attorney to formulate and render legal advice"); Cuno Inc. v. Pall Corp., 121 F.R.D. 198 (E.D.N.Y. 1988) (and reasoning that the attorney-client privilege extended to communications, including those of corporate employees "acting at the direction of their corporate superiors, who communicate to counsel that which is needed to supply the basis for legal advice."); Lintz v. American General Finance Inc., 1999 WL 450197, at *11 (D. Kan. June 24, 1999) (finding privileged a note between management and employees containing legal advice from counsel, finding that "management personnel for a corporate defendant may discuss privileged matters without waiving the privilege"). Finally, a corporation may

seek to withhold the document based on attorney-client privilege where the document is neither authored nor addressed to an attorney, under certain circumstances. See, e.g., Santrade v. General Electric Company, 150 F.R.D. 539, 545 (E.D.N.C. 1993) (finding that the attorney-client privilege applied where "the document includes communications involving corporate officers and agents who possess the information requested by the attorney or who acted on the legal advice").

With that legal framework in mind, the Court has conducted a review of those documents that the parties have specifically identified and provided to the Court. The Court first addresses Cognizant's Exhibit 8. Concerning Cognizant Exhibit 8, Defendants challenge privilege because no attorney is included in the top-line email. Having conducted an in camera examination of Cognizant's Exhibit 8, the Court is satisfied that the document is privileged. Although the top-line communication does not include an attorney, that communication clearly is just one part of an email chain that conveyed the advice of outside counsel and addressed the implementation of that advice among certain officers of Cognizant. The top-line email is merely a communication establishing a time to speak about the implementation of the underlying legal advice from counsel.

The Defendants also challenge Cognizant Exhibit 9

because an attorney is merely copied on that email. The Defendants argue that merely copying an attorney on an email does not render the communication privileged. That much is indisputable. Merely copying an attorney on an email is not by itself a communication made for the purpose of soliciting or providing legal advice. See In re Riddell Concussion Reduction Litigation, 2016 WL 7108455, at *3 (D.N.J. Dec. 5, 2016) ("Thus, the mere fact that Riddell's counsel is copied on emails does not prove a document is privileged.... Otherwise, parties could facilely avoid producing relevant discovery by simply copying an attorney on every email.") (internal citations omitted).

On the other hand, as the legal framework discussed above illustrates, the mere copying of an attorney, by itself, does not vitiate the privilege, even if the attorney's active involvement in the exchange is not immediately evident. Instead, the Court must evaluate the purpose and content of the communication. See Pearlstein v. BlackBerry Ltd., 2019 WL 1259382, at *12 (S.D.N.Y. March 19, 2019) (upholding attorney-client privilege despite words being copied on an email, reasoning that the email sought attorney review of a draft script for an investor conference call and included the feedback of counsel).

I have conducted an in camera review of Cognizant Exhibit 9. I am satisfied that the document is privileged.

It is true that the specific communications on which Defendants rely do not include counsel. However, the underlying emails in that email chain clearly involve counsel and make clear that counsel provided legal advice. This is not a situation where the attorney is merely copied and takes no active role. Further, the communications on which Defendants rely are further to the implementation of that advice.

I have also conducted an in camera review of Cognizant Exhibit 10. Parenthetically, I would note that some of the documents at issue, specifically DOJ Subpoena Log Entries 1484 to 1485, 1544 to 1545, 2061, and 2063, do, in the main, have an attorney in the "to" or "from" field, specifically Aswin Unnikrishnan, who was senior legal counsel for Cognizant. Specific to Log Entry 1484, which is the same as Cognizant Exhibit 10, I am satisfied, after an in camera review, that it demonstrates that in-house counsel was working in their capacity as an attorney. I am satisfied that this material is protected by the attorney-client privilege. The subject matter of the communication clearly involves the solicitation and conveyance of legal advice regarding, in the broadest sense, negotiation of Cognizant's compliance with the terms and conditions for a project. Moreover, this is not a situation where an attorney was merely copied and took no active role. And although the

email chain also incorporates the corporate communications department, that does not vitiate the privilege because the involvement of the corporation communications department clearly was further to the implementation of counsel's advice.

The Court next turns to the Defendants' assertion that approximately 798 privilege log entries are not valid because the in-house attorneys held "non-legal roles" at Cognizant, in the sense that they were not acting in a legal capacity or providing advice. At the outset, the Court repeats the well-familiar central tenet of the attorney-client privilege, which is that it must be limited to communications made for the purpose of obtaining legal advice, not business matters or the routine affairs of the corporation. See, e.g., Leonen v. Johns-Manville, 135 F.R.D. 94, 98 (D.N.J. 1990). Where communications contain both factual and business advice, courts must ascertain whether "the communication is designed to meet problems which can be fairly characterized as predominantly legal." Id. at 99 (citations omitted). See also Claude P. Bamberger International Inc. v. Rohm & Haas Co., 1997 WL 33768546, at *2 (D.N.J. August 12, 1997), aff'd 1997 WL 33762249 (D.N.J. December 29, 1997) ("[W]here a communication contains both legal and business advice, the attorney-client privilege will apply only if the primary purpose of the communication was to

aid in the provision of the legal advice.").

Accordingly, it is well-settled that advice concerning a corporation's business affairs, technical issues, or public relations is not protected by the attorney-client privilege. Dejewski, 2021 WL 118929, at *1-2; JNL Space Management LLC v. Hackensack University Medical Center, 2019 WL 2315390, at *7 (D.N.J. May 31, 2019) (finding that the defendants failed to establish that the attorney-client privilege applied to an attorney's communications because the documents concerned "lease negotiations, terms of rent, the value of the property ... and overall business due diligence[,]" all of which constituted business advice, rather than legal advice); Goldenberg v. Indel Inc., 2012 WL 12906333, at *4 (D.N.J. May 31, 2012) (finding that emails authored by attorney who was both in-house counsel and a trustee of a the corporation's profit-sharing plan were protected by the attorney-client privilege because they were written in "the course of [counsel's] role as an attorney, not in the course of his duties as a Trustee"); Freedman & Gersten, LLP v. Bank of America, 2010 WL 5139874, at *6 (D.N.J. December 8, 2010) (finding that the attorney-client privilege does not automatically attach to internal investigations by an in-house counsel where counsel's participation is solely "to enforce internal policy or conduct an investigation to remedy

the allegations" rather than providing legal advice). Put most basically, the analysis may be reduced to whether the communication would have been made if the client did not need legal, as opposed to business, services. See Leonen, 135 F.R.D. at 98 (holding that party claiming privilege "must demonstrate that the communication would not have been made but for the client's need for legal advice or services").

The Defendants rely in part on Voluntary Privilege Log Entry 1484 to argue that it does not reflect a request for, or the provision of, legal advice. From the face of the privilege log, I can understand the Defendants' concerns about whether the communication involved the conveyance of legal advice. However, I have reviewed Exhibit 11 in camera, and I am satisfied that it is protected by the attorney-client. In the broadest terms, the email chain involves measures that officers and employees of Cognizant were undertaking to comply with the advice of counsel, and the coordination of those employees' efforts in order to meet certain deadlines. Therefore, the communications squarely fall within that body of case law recognizing that non-attorney communications in furtherance of "the direction of counsel," remain protected by the attorney-client privilege. Littlejohn, 2018 WL 6705673, at *2; SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 518 (D. Conn. 1976).

The Court next addresses that subcategory wherein

the Defendants argue that certain communications on the privilege log cannot be privileged because they involved a third party. This accounts for approximately twenty-five entries. The Defendants argue that by including third parties such as L&T employees in the communication, Cognizant has waived the privilege. Cognizant responds that the documents fall into four categories. Those are as follows:

1. Two documents that were already produced to the defendants. Therefore, the Court need not take any further action at this time.

2. Twenty documents that are attachments to other emails, which themselves are privileged. Cognizant reasons that because the parent emails are internal to Cognizant and reflect legal advice from Cognizant attorneys, so too the attachments must be privileged because they are a part of the parent emails. As to these twenty documents that are attachments, the Court disagrees with Cognizant and agrees with the Defendants. It might be appropriate to withhold the parent emails as privileged, assuming that they do, in fact, involve the solicitation or provision of legal advice. But Cognizant, as the party invoking privilege, fails to explain how the attachments and communications themselves are privileged if those attachments

included third parties, particularly L&T (the company that allegedly was a conduit for the bribe payments charged in the Indictment and was to be reimbursed for it.) Cognizant's conclusory statement provides neither a factual justification for invoking privilege, nor a legal basis. As such, Cognizant falls well short of carrying its burden as the party invoking privilege. See Torres v. Kuzniasz, 936 F. Supp. 1201, 1208 (D.N.J. 1996) (burden is on the party invoking privilege). Accordingly, Cognizant should be required to produce the attachments to the Defendants.

3. Two entries that are attachments to a parent email chain regarding a letter of agreement between Cognizant and L&T regarding the SEZ Hyderabad and Pune facilities. These are Voluntary Log Entries 2126 and 2129. Cognizant asserts that it and L&T (as its contractor) had a common interest in submissions to the Indian authorities concerning the project. Cognizant secondarily argues that the documents concern the SEZ/Hyderabad and Pune projects and are therefore irrelevant. For this argument, Cognizant relies on Judge McNulty's January 24, 2022, Opinion, D.E. 263, at page 25. There, Judge McNulty quashed that part of

Defendants' subpoena seeking materials related to Cognizant's facilities outside the KITS project such as in "Pune, Siruseri, and elsewhere."

The Court both disagrees and agrees with Cognizant. First, to the extent Cognizant suggests that the common interest doctrine shields Log Entries 2126 and 2129 from production, I respectfully disagree. Under the common interest doctrine, "although an attorney actually represents only one party, there is no waiver of the attorney-client privilege by disclosure of privileged communications to third parties with 'community of interest.'" Pittston v. Allianz Insurance Company, 143 F.R.D. 66, 69 (D.N.J. 1992). Parties have a "community of interest" where they "have an identical legal interest with respect to the subject matter of a communication between an attorney and client concerning legal advice.... The key consideration is that the nature of interest be identical, not similar, and be legal, not solely commercial." Id. (citing Duplan Corp. v. Deering Milliken Inc., 397 F. Supp. 1146, 1172 (S.D.S.C. 1974); In re Diet Drug Prods. Liab. Litig., 2001 U.S. Dist. LEXIS 5494, at *14 (E.D. Pa. Apr. 19, 2001) (stating that the doctrine preserves a privilege where persons of companies "share a common legal interest in a legal issue or exchange privileged communications with one another"). For the doctrine to apply, the parties must have an "identical legal interest

with respect to the subject matter of the communication...." Id. Thus, "parties with shared interest in actual or potential litigation against a common adversary may share privileged information without waiving their right to assert the privilege." Thompson v. Glenmede Trust Company, 1995 U.S. Dist. LEXIS 18780, at *15 (E.D. Pa. December 18, 1995). A core premise for the common interest privilege is that the underlying communication itself must be privileged. Grider v. Keystone Health Plan Cent., Inc., 2005 U.S. Dist. LEXIS 44069, at *20 (M.D. Pa. July 28, 2005). In fact, parties must have "an identical and not solely commercial interest," and the communication must be designed to further that shared legal interest. See In re Regents of Univ. of California, 101 F.3d 1386, at 1390; Katz v. AT & T Corp., 191 F.R.D. 433, 438 (E.D. Pa. 2000).

In this case, Cognizant has not carried its burden to establish that the underlying communication was privileged as to each of Cognizant and L&T. But even if it were, Cognizant has not set forth any factual basis to establish that Cognizant's and L&T's legal interests were identical. It may be that Cognizant and L&T had a shared interest in the Indian authorities' consideration of the project, but those interests were not identical and diverged at some point. The case law cited above makes clear that the common interest privilege requires the interest to be identical.

More persuasive, however, is Cognizant's argument that the materials concern projects outside the scope of disclosure that Judge McNulty allowed. Judge McNulty's January 24, 2022, Opinion provides the basis for the Court's conclusion on this subcategory. Even as the January 24, 2022, Opinion afforded a "broad interpretation" to "concepts of relevance [and] admissibility" under Federal Rule of Criminal Procedure 17, see January 24, 2022, Opinion at 24, it rejected Category B subpoena requests "that would mire the case in a complex reconstruction of the design and financing of complex construction projects.... I have likewise rejected those requests that appear to be aimed at ancillary matters, comparable situations, general suspicions of misconduct, and the like." Id. For example, although Judge McNulty allowed Request 3 to proceed as to the KITS project, His Honor quashed Request 3 to the extent it sought information associated with the Pune and Siruseri facilities. Id. at 25. Accordingly, Cognizant is not required to furnish those materials to the Defendants.

There is a caveat, however, concerning the Pune facility in light of the Government's recently filed motion in limine and Judge McNulty's August 2, 2023 Order [D.E. 498]. The Court addresses that below.

Category Two

The Court next turns to the second category of

documents. For this category, Defendants assert that Cognizant has waived privilege, given the breadth of its disclosures to the Government.

The Defendants argue that Judge McNulty's January 24, 2022, Opinion found that Cognizant waived the privilege as follows:

> 1. If Cognizant produced notes or interview summaries to the Government (whether oral or written), those notes and interview summaries were no longer privileged.
> 2. If such a summary conveyed the contents of underlying communications or documents, the underlying communications or documents themselves were no longer privileged.
> 3. Judge McNulty also found that the waiver extended to documents and communications that were "reviewed and formed" any part of Cognizant's presentation to the Department of Justice.

The Defendants acknowledge that Cognizant has produced documents for the first and second categories, specifically the interview summaries and notes that Cognizant produced to the Government, as well as any underlying documents or communications the substance of which Cognizant

conveyed in providing a summary to the Department of Justice.

However, the Defendants complain that Cognizant has produced precious little as to the third category -- i.e., any documents or communications that Cognizant reviewed and which formed part of their presentation to the Department of Justice. The Defendants assert that there must be more documents to be produced in this third category because Cognizant prepared extensively for Government briefings, including the preparation of subject matter briefings; investigation updates, interview readouts, a May 10, 2018, presentation titled "Filip factors & FCPA Corporate Enforcement Policy," as well as talking points and hot document binders for meetings with DOJ. The Defendants reason that the preparation of these materials must have required review of a broader universe of documents and communications than what Cognizant actually presented in the meetings.

For example, Defendants contend that the talking points memorandum prepared by DLA Piper, the outside counsel that conducted the internal investigation and interfaced with DOJ on behalf of Cognizant, stated that DLA produced more than 100,000 pages of material. Further, the talking points memorandum stated that DLA produced those 100,000+ documents not merely as a "data dump," but in such a way as to distill "key findings" and "important documents." Therefore, the

Defendants reason that the DLA talking points demonstrate that Cognizant's presentations were specific and tied to DLA's document review.

Defendants also rely on a June 22, 2017, talking points memo that answered specific questions by the Government such as whether Cognizant's chief executive officer knew about delays at CKC. On that question, DLA answered, "we reviewed our interview memoranda and conducted numerous targeted searches in response to this question and found no evidence to suggest that Frank knew about the delays at CKC."

Another example that the Defendants cite is a May 1, 2018, talking points memo that provided "Summary Findings" from the DLA investigation regarding the "CKC planning permit," "CKC electricity connection," and "CVC environmental clearance."

Defendants also rely on an October 10, 2017, talking points memo regarding "the planning permit process in Chennai" and "the environmental clearance process in Pune," which included a binder and chronology of documents regarding KITS variations.

Based on these examples, the Defendants argue that the DLA presentations describe for the Government both certain pieces of evidence and what the evidence cumulatively did and did not show. The Defendants also assert that the

Government relied on DLA's presentation to be comprehensive as to the core topics forming the basis of the Indictment. For example, the Defendants contend that Cognizant provided the Government extensive documents regarding the KITS planning permit, construction variations, and bribe demand. The Defendants argue that the information that Cognizant, through DLA, provided the Government regarding the KITS planning permit, construction variations, and bribe demand included a lengthy list of categories set forth on pages 30 through 31 of the Defendant's moving brief. These materials, which the Defendants presumably already have, included:

1. Srimanikandan Ramamoorthy's statements regarding the submission of the application for the planning permit, 2014 KITS site visit, and the bribe itself;

2. Sridhar Thiruvengadam's descriptions of the bribe demand, change-order requests received from L&T, and discussions with L&T regarding the bribe;

3. Board member Lakshmi Narayanan's descriptions of the permitting process and government orders;

4. A chronology of the bribe demand and KITS planning permit from approximately March 2014 to March 13, 2015, which included: (a) details of a variation request that L&T sent to Cognizant, and which included a line item for a statutory

approvals/planning permit in the amount of approximately $2.5 million, and (b) Cognizant's India counsel (Deep Baburaaj) seeking clarification on specific statutory approvals and inquiring how L&T intended to make payments to the authorities;

5. Statements by Cognizant's Chief Financial Officer, Karen McLoughlin, that she did not recall: (a) L&T pushing back on getting the planning permit, (b) L&T hiring a consultant to obtain the planning permit, (b) Cognizant freezing payments to L&T in 2014, or (d) Cognizant's head of global procurement, Raj Ghosh, discussing with her that a government official had made a demand for payment regarding the planning permit for the KITS facility;

6. DLA's explanation of its timeline review for the period of May 13, 2014, to June 30, 2014, in responding to respond to Government questions regarding the progress in the planning permit process.

Defendants reason that Cognizant conveyed to the Government such voluminous and detailed information on these subjects, that the amount of material Cognizant reviewed must have been vast. Therefore, Defendants surmise, that review must have included a number of other documents, including:

1. An early 2015 email thread titled "KITS Variation," between various Cognizant employees such as Biswasjit Ghosh (Associate Vice President-Procurement) and P. Ganesh (Associate Vice President of the India Corporate Real Estate Department);

2. Mid-October 2015 emails between Cognizant's in-house counsel and Cognizant employees concerning legal advice from in-house counsel about the process for obtaining the planning permit for the KITS facility;

3. A March 20, 2015, email titled "KITS Variation-Amendment to Construction Contract," reflecting "legal advice/analysis regarding contract/agreement issue";

4. August 4, 2016, to August 9, 2016, emails between and among Ramamoorthy, Karl Buch, and Dana Gilbert (Cognizant's Chief Compliance Officer), regarding payments to L&T concerning the KITS facility.

I will address these materials below.

A second category for which the Defendants argue Cognizant provided disclosures to the Government that should warrant the production of additional materials to them in this case concerns subjects such as FCPA policy development

and enforcement, global risk assessments, and corruption audits. Here, the Defendants argue that Cognizant provided the Government with privileged information from its own investigation regarding the development of its FCPA policies for global-risk assessments and anti-corruption audits such as:

1. Defendant Schwartz's statements on how the FCPA would apply to different types of payments, FCPA red flags, and Cognizant's own anti-corruption policy;
2. Defendant Gordon Coburn's statements regarding FCPA implications on various payments and other employees' adherence to the FCPA;
3. Biswasjit Ghosh's understanding concerning how the FCPA would apply to various payments;
4. Other officers' statements regarding the FCPA and Cognizant employees' adherence to it; and
5. Descriptions of Cognizant's compliance program such as training, risk assessments, internal auditing, and investigation.

However, the Defendants complain, Cognizant refuses to produce "closely related "materials such as:

1. An August 24, 2015, email from Abraham Verghese (Associate Vice Present - Auditing) to Dana Gilbert and copying other employees, titled "FW:

Discussion on Global Anti-Corruption Report";

2. A March 3, 2016, email from Dana Gilbert to Joelle Quilla (Senior Vice President - Legal Department), regarding "Legal advice to an in-house counsel regarding Cognizant's vendor agreements and attaching draft FCPA policy for the purpose of obtaining legal advice";

3. July 29, 2016, emails from Defendant Schwartz to Dana Gilbert titled "L&T statutory approval support";

4. A September 8, 2016, email from Karl Buch to Joelle Quilla, Dana Gilbert, and others "[a]ttaching a memorandum prepared in anticipation of litigation and reflecting legal advice from outside counsel concerning the FCPA."

The Court will also address these items below.

A third subcategory concerns Defendants' argument that Cognizant disclosed to the Government documentation regarding other bribe demands that should warrant further production. According to the Defendants, Cognizant and the Government extensively discussed other instances of bribes allegedly sought and paid at other Cognizant facilities in India. These discussions included a number of disclosures, such as:

1. Steve Casari's recollection of L&T requests for

reimbursement of statutory fees at the Hyderabad facility and his recollection of communications with the Pollution Control Board regarding Pune;

2. Dana Gilbert's recollection of a conversation with Defendant Schwartz after Srimanikandan Ramamoorthy raised the issue of power at KITS;

3. Defendant Schwartz's description of his conversation with Ramamoorthy on the power issue and a call with DLA regarding the issue;

4. P. Ganesh's recollection of a construction timeline and permit approvals at Hyderabad and the installation of electricity at KITS, including L&T's engagement and work proposal;

5. Emails shown to Corporate Controller Rob Telesmanic regarding a Pune environmental issue at various times in 2013 and 2014;

6. Ramamoorthy's description of a construction and environmental approval timeline at Pune and payment by L&T to an Indian government official for the permit;

7. Summaries of investigative findings regarding the alleged bribe demand regarding electricity at KITS, including certain findings of the investigation, particularly involving L&T's actions and the assertion that there was no evidence that

Cognizant reimbursed L&T for a bribe payment;

8. A chronology of the KITS electricity connection from January 2, 2015, to August 2016 that included a number of details concerning Cognizant's engagement of DLA, and the assertion that payment to L&T was halted such that Cognizant did not reimburse L&T for payments and that negotiations with L&T for the project were suspended pending an investigation by the Audit Committee;

9. Account bills at Hyderabad including particular line items regarding statutory approvals; and

10. Detailed information regarding Cognizant's and DLA's investigation of improper payments to Pune, including information regarding the Pune environmental permitting process.

The Defendants complain that despite the breadth of those foregoing disclosures, Cognizant refuses to produce "materials on these very subjects," such as:

1. A June 28, 2013, email from Ramamoorthy to Coburn, Thiruvengadam, and others, titled "FW: Pune CDC environment clearance update";

2. A January 21, 2014, spreadsheet titled "CDC Pune -- statutory summary status -- 2/9/2013" authored by "admin";

3. A June 26, 2015, email from Biswasjit Ghosh to

India and APC general counsel Deep Baburaaj copying Ramamoorthy and others, titled "Cognizant KITS and Hyderabad campus," regarding "legal advice/analysis regarding contract/agreement issue";

4. Documents circulated on January 5, 2016, titled "CKC -- letter to TNEB" that reflect "legal advice/analysis regarding permit/license issue";

5. An August 2, 2016, email thread titled "KITS Power" circulated between Steven Schwartz, Gordon Coburn, Ramamoorthy, Dana Gilbert and others;

6. July 10, 2013, emails between Raj Ghosh, as Cognizant's head of global procurement, and Biswasjit Ghosh, the Associate Vice President of procurement, "reflecting legal advice from a request from legal advice from in-house counsel concerning process for obtaining statutory approvals for Cognizant's Adibatla Hyderabad facility."

The Defendants argue that these documents should be produced under the third category of waiver that Judge McNulty identified in His Honor's January 24, 2022, ruling -- i.e., materials that were reviewed and formed any part of Cognizant's presentation to the Department of Justice.

Cognizant principally advances two arguments in opposition to the Defendants' request. First, to the extent

that the Defendants seek in this second category of materials documents and communications from the Category A Privilege Log, the Court should reject those challenges to the privilege assertions as moot. Cognizant reasons that the Category A documents concerned only the Garrity/Brady motions. Cognizant argues that Judge McNulty allowed the Category A subpoena to issue solely to allow the Defendants to take discovery for the Garrity/Brady pretrial motions. Indeed, in his September 14, 2020, Opinion, Judge McNulty ruled that "I will grant the issuance of trial subpoenas relevant to the narrow issue of investigative 'outsourcing,' as it relates to a potential pretrial motion for suppression of coerced statements of Coburn and Schwartz." See September 14, 2020, Opinion, D.E. 96, at 12. Judge McNulty further defined "relevance" for purposes of the Category A subpoena to mean "relevance to a potential Garrity motion to suppress the coerced statements of Schwartz or Coburn." Id. at 16.

However, Cognizant omits other language from Judge McNulty's opinion. After defining "relevance," Judge McNulty added: "[B]ut I will also allow some breathing room for the surrounding context. I repeat, for clarity, that subpoenas for a broader range of documents may be appropriate in connection with obtaining evidence for defense at trial." Id. at 16. Therefore, Judge McNulty clearly contemplated a

potentially more expansive production from Cognizant to allow the Defendants to prepare for trial. If, for example, the Defendants intend at trial to formulate a defense that Cognizant scapegoated them as part of part of its cooperation with the Government and to take advantage of the Risha factors, these materials might be as relevant for trial as for the Garrity hearing. That Judge McNulty contemplated Cognizant producing the documents in response to a different trial subpoena is beside the point, if the documents are pertinent to the defense at trial pursuant to Federal Rule of Civil Procedure 17. Indeed, Judge McNulty's January 24, 2022, Opinion, recognized that the Defendants' Category B subpoena was overly broad. Nonetheless, the Court allowed "more discovery than is typical" for several reasons. One such reason was that Cognizant had completed the investigation to exculpate itself, and "to dissuade the Government from pursuing criminal charges against the corporation, and instead focus its attention on the two individuals here." January 24, 2022, Opinion, D.E. 263, at 24-25. In that it is reasonable to expect that to be a central part of the defense in the criminal case, Cognizant's argument on this score is unpersuasive.

Cognizant's second argument, which relies on the scope of waiver set forth in the January 24, 2022 ruling, is more persuasive. Cognizant argues that the scope of waiver

is not nearly as broad as the Defendants contend. According to Cognizant, the Defendants are speculating that every document remotely related to the subject matter of Cognizant's presentation to the Government is "closely related" so as to form part of the presentation to DOJ. To rule for the Defendants on this category, Cognizant reasons, would nullify the limitations Judge McNulty carefully crafted in defining the scope of Cognizant's waiver. Further, Cognizant argues that all the Defendants have done is summarize a broad list of topics discussed during different Cognizant presentations to the Government and then cross-referenced those topics with privileged documents based on the privilege log descriptions. But, Cognizant urges, merely because privileged documents might relate to the same general subject matter as a presentation to the Government does not mean that the Cognizant attorneys reviewed and relied on that privileged document in any presentation or summary to the Justice Department. In fact, Cognizant provides specific examples from the Defendants' moving brief to show that Cognizant did not waive privilege because its attorneys did not review and rely on those documents in their presentations to the Department of Justice. For example, Cognizant argues, in seeking more documents concerning the "KITS planning permit, construction variations, and the alleged bribe of Indian government officials," the Defendants

rely on two October 2015 privileged email threads where Cognizant employees sought and received legal advice from Cognizant's in-house counsel. For example, in Defense Exhibits 13 and 14, the employees sought legal advice concerning what Cognizant had to submit in its application to the Indian authorities for a planning permit. Cognizant argues that the Defendants do not connect these privileged documents to any disclosure to the Government and, instead, merely list general descriptions of information that Cognizant did disclose. However, none of the items that Cognizant disclosed to the Government references these emails, even indirectly.

The Court finds Cognizant's second argument regarding the scope of the waiver persuasive. The Defendants essentially contend that merely discussing a general topic with the Government constitutes a waiver of the privilege as to all materials and communications relating to that general topic. But that argument misapprehends the scope of the waiver that Judge McNulty found. It is not nearly so broad.

In the January 24, 2022, Opinion, Judge McNulty found that the waiver "extends to documents and communications that were reviewed and formed any part of the basis or presentation, oral or written, to the DOJ in connection with this investigation." See January 24, 2022, Opinion, D.E. 263, at 14. A mere overlap of subject matter

is insufficient for waiver. And I cannot speculate that Cognizant waived based merely on the overlap in subject matter. The Defendants provide no correlation to show that the documents they seek above were "reviewed and formed of a presentation to DOJ." Instead, Defendants argue that the breadth of Cognizant's disclosures to the Government on certain subjects like those above necessarily compels the conclusion that Cognizant waived privilege as to any material on the same subject, even absent a showing that the material formed part of the presentation to DOJ. For example, Defendants do not explain how this Court can conclude with any confidence that the October 2015 emails between Cognizant in-house counsel and Cognizant employees regarding legal advice from in-house counsel concerning the process for obtaining the planning permit for the KITS facility formed part of a presentation to the Justice Department. For that reason as well, the Defendants' argument in their July 19, 2023, letter (D.E. 494), that the Government's exhibit list somehow establishes that Cognizant waived privilege for the category "FCPA policy development and enforcement, global risk assessments & corruption audits," is unpersuasive.

The Government's exhibit list includes the following:

Government Exhibit 22: Certification of Commitment to Cognizant's Core Values and Standards of

Business Conduct, signed by Gordon Coburn on November 4, 2013;

Government Exhibit 159: Certification of commitment to Cognizant's Core Values and Standards of Business Conduct, signed by Gordon Coburn on December 3, 2014;

Government Exhibit 170: Certification of Commitment to Cognizant's Core Values and Standards of Business Conduct, signed by Steven Schwartz on December 26, 2014;

Government Exhibit 177: January 15, 2015, email from Bryan Jenkins to Gordon Coburn, "Annual Report and Proxy Information (Gordon Coburn)," with attachments;

Government Exhibit 179: January 30, 2015, email from Bryan Jenkins to Steven Schwartz, "Re: FW: Annual Report and Proxy Information (Steven Schwartz)," with attachments.

Defendants assert that those exhibits demonstrate that Cognizant's FCPA policy development and enforcement, including global risk assessments and anticorruption audits, will be relevant at trial. See July 19, 2023, Letter, D.E. 494, at 3.

But even if that were true, there is no basis in the record to conclude that Cognizant waived privilege as to

the documents it did not produce. Defendants do not contend, nor is there any evidence to suggest, that Cognizant disclosed such a broad swath of material to the Government, much less during investigation into specific allegations of bribery such as to warrant wholesale, entirely subject matter-based waiver untethered to Cognizant's actual presentations to the Justice Department. Nothing in the record suggests, much less explains how, Cognizant's presentations to the Government necessarily entailed Cognizant and/or DLA not merely reviewing the materials that the Defense now seeks, but also incorporating those materials into its presentation such that those materials could fairly be said to have been "reviewed and formed any part of the basis of a presentation to DOJ."

Defendants' position also calls for me to speculate that the materials are relevant. Judge McNulty's January 24, 2022, Opinion took care to distinguish Rule 17 subpoenas from civil discovery demands and subpoenas, which generally afford parties much broader latitude. Under Rule 17, however, the requesting party "must show the evidentiary nature of the requested materials with appropriate specificity and do more than speculate about the relevancy of the materials being sought." January 24, 2022, Opinion, D.E. 263, at 5 (quoting United States v. Onyenso, 2013 WL 5322651 (D.N.J. September 20, 2013)). And while Judge McNulty, after finding

waiver, afforded the Defendants a considerable amount of latitude in response to both the Category A and Category B subpoenas, it remains that he also rejected a number of the Defendants' requests as either outside the scope of waiver or not within the "evidentiary nature" of Rule 17. For example, in addressing the Category A subpoenas, Judge McNulty found: "Broadly, I find that Cognizant's focus on materials relevant to Cognizant's internal investigation and Defendants' interviews is better tailored to the case law in my prior opinion than Defendants' request for 'documents concerning the investigation broadly or documents concerning Cognizant's inquiry into Defendants' generally.'" See January 24, 2022, Opinion, D.E. 263, at 16.

In that same Opinion, Judge McNulty also stated, in addressing the Category A subpoenas, that it was necessary to limit the scope of Cognizant's document custodians because the Defendants had offered "no more than opinions that these additional custodians would 'naturally' or 'likely' possess" relevant records. Id. at 19. Further, in addressing the Category B subpoenas, Judge McNulty stated that "I had granted those requests which appear to be aimed directly at evidence pertinent to the two main issues," those being "(1) Defendants' authorization of Cognizant India to authorize L&T to pay a bribe in an April 2014 video conference call; and (2) Defendants' authorization of Cognizant India to pay L&T

'manufactured expenses' to reimburse L&T for the bribe." Id. at 24.

Further, Judge McNulty rejected Defendants' requests to the extent that those "would mire the case in a complex reconstruction of the design and financing of complex construction projects, where those that seek broad categories of documents on the theory that if there is useful material, it would be found somewhere within those categories. I have likewise rejected those requests that appear to be aimed at ancillary matters or comparable situations, general suspicions, and the like." Id. Therefore, for example, even as to the KITS project, Judge McNulty refused the Defendants documents and communications with only tenuous relevance, such as L&T's general construction practices, L&T's and Cognizant's use of consultants, and design basis reports for the KITS facility. Id. at 26. Judge McNulty subsequently denied the Defendants' request to compel Cognizant to produce, in response to the Category A subpoena, draft press releases reflecting possible changes or edits between September 23, 2016, and September 30, 2016, after finding that the Defendants had not "shown with sufficient specificity that the changes ... or legal advice about such changes go to the 'heart' of the investigative outsourcing inquiry or are necessary for its resolution." April 17, 2023, Opinion, D.E. 467, at 4-5.

Judge McNulty's rulings on the privilege and relevance issues inform this Court's assessment of the documents that the Defendants seek in this second category. The parameters in those opinions persuade the Court that with a few limited exceptions, even if the Court did find the requests to be within the scope of waiver, they are plainly not relevant. For example, the Defendants seek mid-October 2015 emails between Cognizant in-house counsel and Cognizant employees regarding legal advice from in-house counsel regarding the process for obtaining the planning permit for the KITS facility. But, as noted above, the January 24, 2022, Opinion already denied the Defendants' request for documents concerning the design and financing of complex construction projects as well as documents and communications concerning planning permits and meetings. Defendants also seek a March 20, 2015, email concerning the KITS variation-amendment to construction contract, but this request is akin to those that Judge McNulty determined had, at best, tenuous relevance and were well outside the "two main issues" underlying the case. Defendants merely speculate that this material might be relevant, and that it might have been reviewed and formed part of the basis for any presentation to the Department of Justice, absent any specific explanation as to how it would be probative of the issues for trial.

The Defendants also seek a broad swath of documents pertaining to Cognizant's FCPA policy, development and enforcement, its global risk assessments, and its corruption audits. The Court has already addressed the issue of waiver. But beyond that, the January 24, 2022, ruling squarely rejected Defendants' request for documents generally concerning Cognizant's FCPA compliance of anticorruption programs. It is difficult to understand how the documents that Defendants seek here differ from those requests. Moreover, the Government's inclusion in its exhibit list of a discrete set of documents specific to Defendants does not alter this conclusion. The Government's exhibit list includes, for example, certifications by Gordon Coburn and Steven Schwartz attesting to their commitment to Cognizant's standards for the conduct of business and core values. See, e.g., Exhibit 1 to July 19, 2023, letter, D.E. 494-1 at Government Exhibits 22, 159, and 170. The Government's exhibit list also includes emails forwarding an annual report in 2015 to each Defendant. Id. at Government Exhibits 177 and 179. But the Defendants do not explain how their conduct certifications and the forwarding of the Cognizant annual report now render relevant the global risk assessments, corruption audits, and FCPA policy developments for Cognizant as a whole.

The Defendants also seek a wide array of documents

concerning other facilities, particularly Pune, but also Hyderabad, including emails from June 28, 2013; January 21, 2014; June 26, 2015; and July 10, 2023. In their original briefing, the Defendants failed to explain how these documents were relevant to the underlying issues for trial as opposed to the documents concerning the Pune and Siruseri facilities that Judge McNulty already found not sufficiently evidentiary to qualify under Rule 17. The Court is aware and will discuss below the Government's motion in limine. At this juncture, and subject to Judge McNulty's ruling on the in limine motion, the Court will deny the Defendants' request to functionally revisit Judge McNulty's ruling as to these documents.

There are a few documents that the Defendants seek and that appear to be relevant, despite Cognizant's assertions to the contrary. Further, the subject matter concerning these particular documents is sufficiently aligned with the allegations of the indictment and Cognizant's disclosures and presentations to the Government, to warrant further scrutiny and consideration on the issue of waiver. Specifically, the Defendants seek an early 2015 email thread regarding the KITS variation between Cognizant employees, including Biswasjit Ghosh and P. Ganesh, titled "KITS Variation," as well as a March 20, 2015, email titled "KITS Variation-Amendment to Construction Contract," reflecting

"legal advice/analysis regarding contract/agreement issue." The Court notes that Judge McNulty's January 24, 2022, Opinion at page 25, allowed Requests 3(a) through 3(c), which sought "variation requests and cost estimates associated with the KITS project...." Further, as the Defendants note, the materials that Cognizant disclosed to the Government included information regarding the KITS planning permit and variations as well as the bribe demand. So to the extent that the early 2015 email thread addresses the variation to the KITS construction project, that is sufficiently related to "variation requests and cost estimates associated with the KITS project" as to be relevant under Rule 17 and potentially within the third category of waiver that Judge McNulty found in his January 24, 2022, Opinion.

Accordingly, the Court respectfully recommends that the District Court offer Cognizant a choice: Cognizant may either: (a) produce the early 2015 email thread and the March 20, 2015, email to the Defendants, or (b) it may file by August 25, 2023, a letter not to exceed five double-spaced pages explaining why those materials are privileged and no waiver applies. Cognizant shall also submit the emails to the Court for in camera review. The Defendants may respond by letter not to exceed five double-spaced pages by September 1, 2023.

The Defendants also seek emails dated August 4,

2016, to August 9, 2016, between and among Ramamoorthy, Dana Gilbert, and Karl Buch regarding payments to L&T for the KITS facility. Insofar as the Court understands L&T to have been the construction company for the KITS project, it is reasonable to assume Cognizant made payments to L&T for various purposes that have nothing to do with a bribe payment. However, the inclusion of Mr. Buch on the email thread and that it was transmitted when Cognizant was investigating the allegations and disclosing its investigative results to the Government, persuades the Court that the L&T payments addressed in the email thread may not only be relevant to the indictment, but may be sufficiently aligned with those materials and information conveyed to the Government as to be within the third category of waiver. Therefore, the Court similarly recommends offering Cognizant a choice as to these emails dated August 4, 2016, to August 9, 2016. The Undersigned respectfully recommends that the District Court allow Cognizant to either: (a) produce them to the Defense, or, (b) file by August 25, 2023 a letter not to exceed five double-spaced pages explaining why the emails are privileged and no waiver applies, as well as the email thread to the Court for in camera review. The Defendants then may respond by letter not to exceed five double-spaced pages by September 1, 2023.

As I mentioned above, there is an important caveat

to the materials that Defendants seek regarding the Pune facility. The Court has reviewed Defendants' July 19, 2023, letter; Cognizant's July 24, 2023, response; Defendants' July 31, 2023, letter; and Judge McNulty's August 2, 2023, Order (D.E. 494, 496, and 498). The Court is aware that on August 3, 2023, the Government moved in limine to admit evidence concerning an alleged bribe payment and reimbursement of that bribe payment regarding the Cognizant facility in Pune, India, in 2013. See, e.g., Government Omnibus Brief in Support of Motions in Limine, D.E. 501, at 18-19. The Government seeks to admit testimony that in 2013, L&T paid approximately $600,000 in bribe money to obtain environmental clearances for the Pune project, and Cognizant agreed to reimburse L&T for the bribe money. Id. at 19. Further, the Government expects the witness will testify about an April 2014 call with the Defendants concerning the $2 million bribe, during which the witness informed the Defendants of the Pune bribe. The Government also seeks to introduce Defendant Schwartz's contemporaneous notes of the conversation to corroborate that witness's testimony. Id. The Government argues that the evidence concerning the Pune bribe is intrinsic to the charged offenses and in any event is separately admissible under Federal Rule of Evidence 404(b). Id. at 2-27.

In view of the Government's motion, Defendants have

asked the Court in both the July 19, 2023, and August 2, 2023, letters to reconsider the ruling concerning Cognizant's motion to quash Defendants' requests for motion and materials concerning the Pune facility. Essentially, Defendants ask the District Court to reinstate their Category B subpoena to the extent it sought information concerning the Pune facility and the alleged payment of approximately $700,000 in or around 2013 to expedite the environmental clearances.

On August 2, 2023, Judge McNulty ordered that "the requests will be handled, if necessary, in connection with the anticipated motion in limine by the Government." Order, August 2, 2023, D.E. 498, at 2. Therefore, to the extent the Defendants seek these materials from the Undersigned, as part of their original motion pursuant to the May 18, 2023, Order, the Court recommends that the District Court deny the application, but subject to further action by the District Court after it has adjudicated the Government's in limine motion regarding the alleged Pune facility bribe.

Category Three

The Court now turns to the third category of documents, which may loosely be described as documents concerning the Defendants' support for Cognizant's internal investigation. For this category, the Defendants argue that the Garrity/Brady hearing on April 18, 2023, and April 19, 2023, revealed that Cognizant produced to the Government

privileged documents purporting to show the Defendants pushing for the internal investigation to be completed more quickly and questioning why it had not yet been completed. For example, Cognizant produced to the Government documents and communications such as Defense Exhibit 16. Defense Exhibit 16 is a series of emails dated in early June 2016 that included Steven Schwartz, Dana Gilbert, Karl Buch, and others. The emails suggest that Defendants Coburn and Schwartz were pushing for DLA to complete the internal investigation by the end of June 2016.

Defendants also rely on Defense Exhibit 17. Defendant Exhibit 17 is a series of emails that overlaps, to some extent, with those in Defense Exhibit 16 except that Defense Exhibit 17 includes a June 7, 2016, email from Steven Schwartz to Dana Gilbert and other Cognizant staff. In that June 7, 2016 email, Schwartz confusion that the internal investigation could not be completed by the end of June 2016.

Finally, Defendants rely on Defense Exhibit 18. Defense Exhibit 18 is a series of emails that Steven Schwartz sent on June 9, 2016, between 8:06 A.M. and 8:56 A.M. to Dana Gilbert and Henry Shiembob. In addition to making clear that he wanted the internal investigation completed by the end of June, Steven Schwartz stated in part that "I have not heard anything today that leads me to believe that we have any solid evidence of wrongdoing. Again, my question is what is

going on here?!"

Mr. Schwartz also stated that he had "no faith in our advisors at this point," and "I keep hearing that there are violations, but when I press on them, I hear we do not know yet. These guys are speaking out of both sides of their mouths."

The Defendants argue that Cognizant, even as it produced the foregoing materials to the Government, withheld "closely related" documents showing that the Defendants assisted with the internal investigation and encouraged others to do so. According to the Defendants, this disparity in production, coupled with the testimony of Karl Buch at the Garrity/Brady hearing establishes that Cognizant has inconsistently applied the attorney-client privilege.

At the Garrity/Brady hearing, Mr. Buch testified that documents showing the Defendants assisting in the investigation were privileged because during that period, Defendant Schwartz was participating in the internal investigation as a member of the investigative team. Accordingly, Defendants reason, Mr. Buch testified that Cognizant did not report to the Government the steps that Schwartz took to ask witnesses to cooperate with the investigation, and therefore Cognizant has withheld exculpatory documents showing that both Defendants directed others to assist in the investigation, such as by referring

them directly to DLA.

It is helpful here to consider Mr. Buch's specific testimony. During the hearing on April 19, 2023, Mr. Buch testified that Cognizant informed the Government that Mr. Schwartz "had previously declined to participate in illegal payment in relation to the Provident fund." See Transcript of April 19, 2023, Hearing, Defendants' Exhibit 25, D.E. 486-26, at 368:3 to 368:6. Mr. Buch also testified as follows:

> Q: Did you ever provide to the Government exculpatory evidence regarding steps that Mr. Schwartz took to assist in the internal investigation that was going on?
>
> A: I think we took the position that, to the extent that Mr. Schwartz was participating in the internal investigation as a member of the investigative team, that his activities were privileged. And we did not report the steps that Mr. Schwartz took to ask witnesses to cooperate with the investigation to the Government.
>
> Q: But you were aware of those steps?
>
> A: I am.

Id. at 369:6 to 369:16.

The Defendants therefore argue that Cognizant's withholding of documents and communications showing the

Defendants assisting with and supporting the internal investigation constitutes selective waiver because Cognizant disclosed privileged documents that cast the Defendants in an unfavorable light, while withholding documents showing the opposite. They further argue that Cognizant's production to the Government of only the inculpatory communications is exactly the sort of waiver that Judge McNulty contemplated in his January 24, 2022, waiver ruling.

Parenthetically, the dispute before the Court actually raises issues of both selective waiver and partial waiver. The Third Circuit explained the distinction in Westinghouse Electric Corp. v. Republic of Philippines, 951 F.2d 1414 (3d Cir. 1991):

> Selective waiver permits a client who has disclosed privileged communications to one party to continue asserting the privilege against other parties. Partial waiver permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same examinations.

Id. at 1423 n.7.

The Third Circuit further explained:

> When a party discloses a portion of otherwise privileged materials while withholding the rest, the privilege is waived only as to those communications actually disclosed unless a partial waiver would be unfair to the party's adversary. If partial waiver does

> disadvantage the disclosing party's adversary by, for example, allowing the disclosing party to present a one-sided story to the Court, the privilege would be waived as to all communications on the same subject.

Id. at 1426 n.12.

Of course, the Third Circuit in Westinghouse unambiguously rejected the selective waiver rule. It did not consider the partial waiver rule, as that case "involve[d] selective, rather than partial, disclosure." Id. at 1426.

Defendants provide examples of documents that, they say, establish their assistance with the internal investigation and encouragement of others to cooperate with it. Defendants emphasize that they have these documents only because Schwartz possessed some of them independently of Cognizant's production." Defense Moving Brief, D.E. 487, at 40. One such example is Defendants' Exhibits 19-20. These consist of a July 2016 email chain concerning updating the Audit Committee. Exhibit 19 is the redacted version that Cognizant produced to the Government, while Exhibit 20 is an unredacted version that Schwartz acquired on his own. The copy that Cognizant produced to the Government shows only the sender, recipients, date, and subject line, which states, "Re: Audit Committee Meeting." The unredacted copy that Defendant Schwartz procured on his own, shows that Schwartz suggested to Cognizant's Chief Executive Officer, Francisco

D'Souza, and Coburn that Schwartz and Dana Gilbert update members of the Audit Committee regarding "the possible FCPA item," which the Court understands to be a reference to Cognizant's internal investigation into the alleged bribe payments. In that same email chain, Coburn agreed and suggested that Schwartz and Gilbert also update the full Audit Committee at its next meeting. In that same email chain, Mr. D'Souza and Mr. Schwartz agreed with Mr. Coburn's suggestion. Therefore, Cognizant redacted Steven Schwartz's first email that suggested a report to certain Audit Committee members as well as his and Mr. D'Souza's ensuing emails showing D'Souza's agreement with Schwartz's proposal.

Another example that the Defendants provide draws from their Exhibits 21 and 22. These are July 2016 emails wherein Mr. Schwartz ensures that the investigation is progressing. According to the Defense, Cognizant withheld these emails and did not log them. But, Defendants maintain, the emails are important because they show efforts by Mr. Schwartz to confirm that the investigation was being conducted properly and was progressing. In the emails, Dana Gilbert sent Steven Schwartz a draft email for him to send to P. Ganesh, the Associate Vice President of the Real Estate Department in India, seeking Ganesh's help in the internal investigation, including collecting documents and records for production to Ernst & Young. The Defendants contend that

Schwartz replied within minutes, showing that he intended to comply without hesitation, and then sent the email to Ganesh, seeking Ganesh's cooperation.

I have reviewed Defense Exhibits 21 and 22. First, with regard to Exhibit 21, it shows that on July 28, 2016, at 11:51 P.M., Dana Gilbert sent Steven Schwartz a draft email for him to send to Ganesh. The draft email references Cognizant's "review" in Chennai, India, and indicates that review was proceeding on a tight timeline. The email also stated that Ernst & Young was collecting documents from the corporate real estate team and asked Ganesh to arrange support for Ernst & Young's collection efforts. Three minutes later, Schwartz responded to Dana Gilbert's email. He proposed that the title for the email should be "L&T Statutory Approval Support," and asked if he should send the email as privileged."

Defense Exhibit 22 is a subsequent email chain related to the emails in Exhibit 21. The first email is dated July 29, 2016, 9:37 A.M., and it is from Steven Schwartz to P. Ganesh, with copies to David Mithra and Dana Gilbert. The subject was "L&T's Statutory Approval Support," and the substance of the letter repeated to P. Ganesh the same language that Dana Gilbert had proposed to Schwartz in the July 28, 2016, email. The next email in the chain is P. Ganesh's July 29, 2016, response to Mr. Schwartz, which also

copied Dana Gilbert and David Mithra. In sum, it assured the recipients that Ganesh and his team were fully supporting the Ernst & Young auditors and provided details of their coordination efforts. The next and final email in Defense Exhibit 22 consists of Mr. Schwartz forwarding Ganesh's response to Dana Gilbert (although Ganesh had already copied her), and asking how to respond to Ganesh's email.

As an aside, the timestamp for some emails, such as Steven Schwartz's, appear to be in Eastern Daylight Time. In fact, Schwartz's emails are often timestamped as such. Other emails do not appear to be within Eastern Daylight Time. For example, if all emails senders were within the same time zone, then in Defense Exhibit 22, Ganesh actually would have sent his response to Schwartz before Schwartz sent the original email. Given that Ganesh was presumably located in India as the Associate Vice President in the India Real Estate Department, the date/time disparity is unsurprising.

The Defendants argue that the fact that Schwartz responded immediately to Dana Gilbert and sent an email to Ganesh shows his cooperation with the investigation. Those cooperation efforts, they aver, provide much different context than the documents that Cognizant produced to the Government. Therefore, the Defendants argue that Cognizant selectively asserted the privilege, and in doing so, misled the Government and denied both the Government and the Defense

access to what otherwise would be exculpatory material. In fact, the Defendants point the Court to the testimony of David Last at the Garrity/Brady hearing. When he testified at the Garrity/Brady hearing, Mr. Last was at the Chief of the Foreign Corrupt Practices Act Division at the Department of Justice. At that hearing, Mr. Last testified he had no reason to believe that Cognizant had withheld any privileged, exculpatory material from the Government. However, Mr. Last allowed that the Government had no visibility into the parameters of Cognizant's privilege assertions because when the Government asked Cognizant about its privilege parameters, Cognizant claimed that those parameters themselves were privileged. Further, Mr. Last testified that, if he knew that DLA or Cognizant had Brady material that they did not disclose to the Government, he would not have brought charges. Therefore, the Court should require Cognizant to search for and produce or submit to the Court for in camera review any documents showing the Defendants assisted in the investigation.

Cognizant advances a number of arguments in opposition. First, Cognizant argues that the Defendants' request for these materials exceeds the scope of this Court's appointment, as set forth in Judge McNulty's May 18, 2023, Order. Cognizant argues that the May 18th Order was limited to "any disputes as to Cognizant's assertions of privilege

with respect to materials listed on Cognizant's privilege logs. See Cognizant Opposition Brief, D.E. 488, at 23 (quoting Order, D.E. 481, at 2).

Here, though, Cognizant argues, Defendants seek undefined exculpatory documents that do not relate to a privilege dispute.

The Court respectfully disagrees with Cognizant. In his May 18, 2023, Order, Judge McNulty referred to me "any disputes as to Cognizant's assertions of privilege with respect to materials listed on [its] privilege logs." See May 18, 2023, Order, D.E. 481, at 2. The first page of the Order makes clear that mandate includes disputes concerning Cognizant's assertions of privilege over materials that the Defendants seek for trial relating to the Cognizant Privilege Log For the DOJ Subpoena, dated November 8, 2018, the Cognizant Privilege Log For Voluntary Document Productions 2016-2018, the Cognizant Privilege Log for its production response to Defendants' Category A subpoena, and the Cognizant Privilege Log for its production response to Category B subpoena. Cognizant has withheld production of the pertinent documents from the Government and Defense, at least based in part, if not wholly, on the basis of privilege. That much is clear from: (1) Cognizant's redactions to Defense Exhibit 9 on the basis of privilege; (2) at least one of the emails in Defense Exhibit 20,

specifically, the July 19, 2016, 1:54 P.M., email from Schwartz to Coburn, Gilbert, and D'Souza regarding the auditors committee meeting, which Cognizant labeled "attorney communication/privilege and confidential"; (3) all of the emails in Defense Exhibit 21 and 22 that claim to be privileged; (4) that Cognizant included at least some of the emails on its privilege log; and (5) the testimony of Mr. Buch, who said that the basis for withholding the communications from the Government was "Mr. Schwartz was participating in the internal investigation as a member of the investigative team, that his activities were privileged, and we did not report the steps that Mr. Schwartz took to ask witnesses to cooperate with the investigation to the Government. See Transcript of April 29, 2023, hearing; Defense Exhibit 25, D.E. 486-2, at 369:6 to 379:16. Accordingly, Judge McNulty's May 18, 2023, Referral Order plainly encompasses this dispute.

Next, the Defendants argue that the Defense request is an attempt to get, in this application, the Brady relief that they unsuccessfully sought before Judge McNulty. Cognizant argues that the Defendants' Garrity/Brady motion sought similar relief and even cited similar examples, specifically Defense Exhibits 19-22. In fact, the Defense there asked Judge McNulty to compel the Government to "search those files for Brady and Giglio material, and turn over any

exculpatory material to the Defense." Cognizant therefore argues in its July 24, 2023, letter that the denial of the Defendants' Garrity/Brady motions on July 20, 2023, mooted Defenses' contentions as to the Category A subpoena and denied Defendants' request to compel Cognizant to require the Government to search Cognizant's corporate files for Brady material. See D.E. 496 at 3-4.

This argument is unpersuasive. The Defendants' Garrity/Brady application and the relief they sought therein, are qualitatively different than the relief the Defendants seek here. In that application, the Defense contended that Cognizant "engaged in a joint effort with the Government to investigate and prosecute Schwartz and Coburn" and that, as a result, "Cognizant's files are deemed to be, and are, in fact, in the Government's constructive possession for constitutional purposes." See Defendants' Proposed Findings of Fact and Conclusions of Law with Respect to Garrity/Connolly/Brady Motions, D.E. 482, at 93. Accordingly, the Defendants asked the Court to require the Government to search Cognizant's files and produce any exculpatory material to the Defense. See Findings of Fact, Conclusions of Law, and Order, July 20, 2023, D.E. 495, at 2. (Hereinafter "Garrity/Brady Opinion"); Id. at 18 n.5 ("at issue is the existence, or not, of a further obligation to search Cognizant's files.").

At the hearing and in his July 20, 2023, ruling, Judge McNulty observed that a central question in the Garrity/Brady application was "whether the company was so dominated by the Government that they should be regarded as being the Government for purposes of Brady." See also Garrity/Brady Opinion at 18. ("The critical inquiry is whether a prosecutor may be deemed to have 'constructive possession' of the evidence, meaning that, 'although a prosecutor has no actual knowledge, he should nevertheless have known that the material at issue was in existence.'") (quoting United States v. Risha, 445 F.3d 298, 303 (3d Cir. 2006)). In fact, Judge McNulty's decision to deny the Defendants' Brady motion was not based on a privilege analysis at all. Instead, Judge McNulty applied the Risha factors to hold that the Government did not have constructive possession of the documents in Cognizant's files and was not obligated to search those files. Id. at 19-22.

This dispute is squarely one of privilege. The Defendants assert that Cognizant selectively waived the privilege by disclosing to the Government privileged materials showing that Defendants impeded Cognizant's internal investigation, while withholding from the Government and Defense materials that show them supporting or facilitating the investigation. A second issue in this privilege analysis is whether, if Cognizant selectively or

partially waived the privilege through some disclosures, whether it should be required to produce those documents. And, at the risk of stating the obvious, the relief that the Defendants seek here is that Cognizant produce the documents, rather than compel the Government to search and produce any such documents.

Cognizant's third argument is also unavailing. In this third argument, Cognizant argues that the Defendants' request is too vague and that Defendant Schwartz already possesses the exculpatory materials. For this argument, Cognizant relies on Exhibits 19 through 22 of the Defendants' brief. Also as examples, Cognizant points to Exhibits 70, 71, 73, and 74 of Schwartz's Garrity/Brady submission, which are also Exhibits 16 through 19 to the declaration of Cognizant counsel Jenny Kramer, Esq. Cognizant points out that it did not produce those exhibits, so they must have come from Mr. Schwartz himself. Cognizant also states that it has repeatedly asked Mr. Schwartz to return them, but to no avail.

The Court first addresses Cognizant's suggestion that the Defendants already have the relevant documents. At the outset, the Court notes for the sake of clarity that most of the emails that Cognizant has presented as examples are the same emails that the Defendants already have, but with different exhibit numbers due to the parties' varying

submissions. So, for example, Exhibit 71 to the Schwartz Garrity submission is the same July 19, 2016, email chain as Defense Exhibit 20 and Kramer Declaration Exhibit 17. Similarly, Exhibit 73 to the Schwartz Garrity submission is the same July 28, 2016, email chain at both Defense Exhibit 21 and Kramer Declaration Exhibit 18. The Schwartz Garrity Exhibit 74 is the same July 29, 2016, email chain as Defense Exhibit 22 and Kramer Declaration Exhibit 19.

There is also Exhibit 70 to the Schwartz Garrity submission that is marked as Exhibit 18 to the Kramer declaration. This is an April 27, 2016, email from Steven Schwartz to Shiembob, Molina, and others, reminding them to keep all information collected as confidential, to preserve all such communications, and to include particular DLA Piper staff on all related communications.

Implicit in Cognizant's argument is that these few documents constitute the full universe of exculpatory materials concerning the Defendants' role in the investigation. But Cognizant does not actually say that. For example, Ms. Kramer's declaration makes no such representation. So Cognizant's tacit suggestion that "this is all there is" falls flat absent any definitive representation to that effect. Moreover, the existence of the emails that the Defendants have secured separate from Cognizant's production, coupled with Mr. Buch's testimony at

the Garrity/Brady hearing, provide a reasonable basis to allow that there might be additional materials that Cognizant has not produced to the Defense or the Government.

So too do the circumstances under which Defendant Schwartz generated the emails that have been provided as examples. Specifically, the scope of Cognizant's internal investigation, and the extent of Schwartz's involvement in that investigation, allow for the reasonable possibility of additional emails. First, it is reasonable to expect that a company's chief legal officer would be actively involved in such investigation, both before and after outside counsel got involved. Presumably, the chief legal officer would be involved in, among other things, assessing the source and basis of the wrongdoing alleged; considering whether to engage outside counsel; consulting with outside counsel concerning the scope of the investigation; identifying the likely sources of relevant documents and communications that outside counsel would need to review, ensuring that outside counsel received such documents; communicating to staff any instructions from outside counsel such as concerning document collection and preservation and ensuring that those instructions are followed; and updating other corporate officers committees and the board of directors about the status of the investigation. And while the corporation's president likely would be less involved than the chief legal

counsel, it is still reasonable to assume there might at least be some involvement or communications.

The exhibits that the parties have put before this Court illustrate just that. Specifically, they demonstrate that the Defendants, and particularly Schwartz, were actively involved in the investigation from its inception in early 2016 until approximately August 20, 2016, when Ramamoorthy was interviewed as part of the investigation and disclosed that the Defendants had "authorized a $2.5 million payment to India officials to obtain the planning permit for a Cognizant facility in Chennai." See Garrity/Brady Opinion at 3. At that point, Coburn and Schwartz were removed from the investigation. Id. Therefore, it is not unreasonable to allow that Cognizant likely possesses additional documents and communications showing that Schwartz and/or Coburn took measures to advance, or at least appear to advance, the investigation for the approximately seven to eight-month period between the inception of the investigation and their removal from the investigation.

Cognizant next contends that Judge McNulty did not find that its waiver was so broad as to encompass materials showing that Defendants Coburn and Schwartz assisted in advancing the investigation. Relying on Judge McNulty's January 24, 2022, Opinion, Cognizant points to the fact that Judge McNulty quashed Request Number 32 of the Category B

subpoena. Category 32 of the B subpoena sought, among numerous other items, "evidence of Mr. Schwartz's long history of ensuring FCPA compliance regarding both the instant allegations and prior bribery allegations to which Mr. Schwartz took specific actions in furtherance of Cognizant's compliance program." As to Request 32, the Defendants had argued that the information was necessary to demonstrate Defendant Schwartz's long history of FCPA compliance. But Judge McNulty struck Request Number 32, finding that the request sought broad categories of documents, "with little specificity of how such materials will yield relevant, necessary evidence" on the hope that it might lead to exculpatory evidence. See January 24, 2022, Opinion, at 27-28. Therefore, Cognizant reasons that the Defendants should not now be allowed to use this application to revisit Judge McNulty's rulings.

This argument is unavailing for several reasons. First, Request Number 32 sought entirely different categories of documents than the materials that the Defendants seek here. Request Number 32 sought communications between Steven Schwartz and other Cognizant officers and employees concerning ten topics that have little, if anything, to do with the Defendants' cooperation with the internal investigation. More importantly, Judge McNulty's ruling concerning Request Number 32 was not based on the scope of

Cognizant's waiver. That ruling was squarely grounded on the "evidentiary" standard of Federal Rule of Criminal Procedure Rule 17. See id. Judge McNulty concluded that Request Number 32, along with Request Number 33, was overly broad, and unsupported by any specific argument as to how those requests would yield necessary evidence. Id. Accordingly, Judge McNulty struck Request Number 32 for failing to meet the standards under Rule 17 and United States v. Nixon, 418 U.S. 683, 699-700 (1974), that the materials be "evidentiary, relevant, and necessary for 'Defendants to properly prepare for your trial.'" Id. at 23 (quoting Nixon).

The Court is persuaded that Cognizant waived any privilege concerning emails demonstrating that the Defendants assisted in advancing the investigation, including but not limited to the examples that the Defendants have provided as well as the April 27, 2016, email from Schwartz to Shiembob and others, marked as Schwartz Garrity Exhibit 70 and Kramer Declaration Exhibit 16. This Court is guided by Judge McNulty's January 24, 2022, and April 27, 2023, Opinions concerning the scope of Cognizant's waiver. In the January 24, 2022, Opinion, Judge McNulty reasoned that "where a partial waiver disadvantages the disclosing party's adversary 'by, for example, allowing the disclosing party to present a one-sided story to the court, the privilege would be waived as to all communications on the same subject.'"

January 24, 2022, Opinion at 9 (quoting Westinghouse Electric Corp., 951 F.2d at 1423-24).

In finding that Cognizant's disclosures to the Government effected a "significant" waiver of privilege, Judge McNulty held that "Cognizant's voluntary turnover of materials in revelation of the fruits of its investigation to the DOJ also entailed a waiver of privilege as to communications that 'concern the same subject matter' and 'ought, in fairness, be considered together' with the actual disclosures to DOJ." Id. at 13-14 (quoting Shire LLC v. Amneal Pharmaceuticals LLC, 2014 WL 1509238, at *6 (D.N.J. January 10, 2014)). Accordingly, Judge McNulty defined the scope of Cognizant's waiver based on its disclosures to the Government in the three categories that this Court has already discussed and that are well familiar to the parties. See id. at 14.

In his April 17, 2023, Opinion, Judge McNulty drew a distinction that is pertinent here. First, he denied Defendants' request that Cognizant produce notes and summaries of meetings between Cognizant representatives and the Government. See April 17, 2023, Opinion, D.E. 467, at 3. Judge McNulty determined that those documents constituted work product, which Cognizant did not waive because it did not produce those materials to the Government. Id. at 3-4. Judge McNulty allowed that those documents might contain

information conveyed to the Government, but found that "they fall within the privilege, are less weighty in relation to the issue of whether the Government ordered or coerced the Defendants' interviews, and likely would duplicate other records or testimony." Id. at 4. But in delineating the scope of examination of Cognizant's witnesses at the Garrity/Brady hearing, Judge McNulty found that Cognizant's proposed list of topics was too narrow and overlooked that part of his January 24, 2022, ruling that included materials that "concern the same subject matter" and "ought in fairness be considered together" with those disclosures that Cognizant made to the Government. Id. at 6 (quoting January 24, 2022, Opinion at 14). Therefore, Judge McNulty allowed the Defense to question the "witnesses about otherwise privileged communications or work product to the extent that such communications or work product were either directly conveyed to the Government or fall into one of the three buckets outlined above." Id. at 7.

The communications that Defendants seek here do not fall neatly into one of the three buckets that Judge McNulty delineated in the January 24, 2022, and April 17, 2023, Opinions. But that is not particularly surprising, because the current dispute chiefly arose at the Garrity/Brady hearing and had not been presented to Judge McNulty. In that regard, Cognizant's suggestion that Judge McNulty previously

considered this issue is puzzling. See July 24, 2023, Letter, D.E. 496, at 3. Although Judge McNulty did consider the issue of selective waiver in his January 24, 2022, Opinion, nothing in that decision, or in any other decision by His Honor, suggests that he was called upon to address this particular issue.

Cognizant cites page 8 of the January 24, 2022, Opinion. See July 24, 2023, Letter, at 3. But that merely provided the standards for waiver. Cognizant also cites Docket Entry 451 at page 23, Footnote 15. See id. But that is a letter brief from Defense counsel complaining that was Cognizant was withholding exculpatory documents.

In any event, the current dispute appears to have incepted, or at least crystallized, in the wake of Mr. Buch's testimony that Cognizant did not disclose such communications to the Government and instead took the position that those were privileged. Mr. Buch's testimony suggested Cognizant would not have summarized any such documents' contents for the Government. And while it is possible that Cognizant reviewed such documents, the record does not suggest that the communications formed any part of any presentation to DOJ, oral or written.

Nevertheless, in both the January 24, 2022, and April 17, 2023, rulings, Judge McNulty clearly allowed that waiver would extend to undisclosed materials that concern the

same subject matter as the disclosed materials, and should be considered together as a matter of fairness. Indeed, in delineating the scope of Cognizant's waiver, Judge McNulty expressly considered Federal Rule of Evidence 502(a). See January 24, 2022, Opinion, at 8. Under Rule 502(a), waiver will apply if "the disclosure is made ... to a federal office or agency" just as it would apply in a federal court proceeding. Rule 502(a) also provides that the waiver will apply if:

1. The waiver is intentional;

2. The disclosed and undisclosed communications are information that concern the same subject matter; and

3. They ought in fairness be considered together.

Federal Rule of Evidence 502(a).

Judge McNulty noted that waiver occurs "'when the privilege-holder has attempted to use the privilege as both 'a sword' and 'a shield' or when the party attacking the privilege will be prejudiced at trial.'" January 24, 2022, Opinion at 8-9 (quoting Shire LLC v. Amneal Pharma., 2014 WL 1509238, at *6 (D.N.J. Jan. 10, 2014)). See also Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (declining to find privilege against selective waiver and stating that "the client cannot be permitted to pick and choose among his opponents, waiving the privilege for some

and resurrecting the claim of confidentiality to obstruct others, to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.... The attorney-client privilege is not designed for such tactical employment.").

In this case, Cognizant produced to the Government communications that the Government may seek to introduce at trial to show that Defendant Coburn and/or Defendant Schwartz attempted to interfere with, or bring to a premature conclusion, the internal investigation. See, e.g., Defense Exhibit 16-18. In fact, the Government's exhibit list, which was not available at the time of the original briefing but which the Defense attached as Exhibit 1 to its July 19, 2023, letter (D.E. 494-1), includes the June 2016 emails marked as Defense Exhibits 16 to 19 that I discussed above. Parenthetically, for purposes of Rule 502(a)(1), there was no dispute that Cognizant's production to the Government was intentional. It follows, then, that documents and communications wherein Defendant Schwartz and Coburn supported the internal investigation, and encouraged others to do so, constitute the "same subject matter" under Rule 502(a). In either instance, the material is indicative of Defendants' intentions and actions vis-à-vis the internal investigation.

The next question is whether, under Rule 502(a),

the disclosed and undisclosed communications in materials "ought, in fairness, be considered together." Certainly, the early June 2016 emails from Defendant Schwartz marked as Defense Exhibit 16 to 18 and included on the Government exhibit list, by themselves, could suggest that Defendant Schwartz, and perhaps to a lesser extent Defendant Coburn, did not support the internal investigation and sought to end it. And the Government's exhibit list suggests that the prosecution might seek to introduce them at trial. Presented in isolation and without further context, those communications might indeed constitute strong evidence that Schwartz and Coburn wanted the investigation shut down prematurely to protect their own interests. Further, Schwartz's emails on June 9, 2016, could be interpreted as a preemptive effort to discredit the eventual findings of the investigation. In isolation the trier of fact would not otherwise be aware of efforts that the Defendants might have undertaken to advance the investigation such as those reflected in the July 2016 emails marked as Defense Exhibits 19-22. Those communications could reasonably be construed as Schwartz cooperating with the investigation even though, only a month before, he questioned its direction and pressed for its closure by the end of June. The Defendants would thus be at a distinct, and distinctly unfair, disadvantage, as the jury would have access to only those

communications suggesting that the Defendants sought to stymy the internal investigation. Accordingly, communications and materials showing Schwartz and Coburn supporting the internal investigation ought, in fairness, be considered with those show them seeking to interfere with or shut down the investigation. The former category might constitute important evidence for the Defense to introduce at trial in responding to the emails such as Defense Exhibits 16 through 18, and for the jury to consider in forming a complete and accurate assessment of the Defendants' words and actions regarding the internal investigation.

This conclusion is entirely consistent with Judge McNulty's prior rulings. At the risk of redundancy, it is important to recall that Judge McNulty, in considering the scope of Cognizant's "significant" waiver, held that "Cognizant's voluntary turnover of materials or revelation of the fruits of its investigation to the DOJ also entailed a waiver of the privilege as to communications that 'concern the same subject matter' and 'ought in fairness be considered together' with the actual disclosures to DOJ." January 24, 2022, Opinion, at 13-14.

This conclusion is also consistent with Third Circuit law on the scope of waiver. In In re Teleglobe Communications Corp., the Third Circuit noted that the touchstone for partial waiver -- i.e., "whether the waiver

also ends the privilege as to any related but not disclosed communications" -- "is fairness." 493 F.3d 345, at 361 (3d Cir. 2007). Because Cognizant and Defendants are not directly adverse in the criminal case, it is not entirely accurate to say that Cognizant's partial disclosures seek to take advantage of the Defendants.

However, Cognizant's production of materials such as emails suggesting that Defendants attempted to interfere with the internal investigation, while withholding materials showing Defendants' efforts to support or further the internal investigation, provide a significant unfair advantage to the Government by depriving the Defense of any opportunity to paint a more complete picture of the Defendants' actions with respect to the internal investigation, and would also deprive the finder of fact of important evidence to form a complete understanding of the Defendants' words and actions vis-à-vis the internal investigation. See also Westinghouse Electric Corp., 951 F.2d at 1427 n.14.

The final issue in this third category is the scope of what Cognizant must actually produce. The parties offer scant guidance on this issue. As Cognizant fairly observes, Defendants offer little by way of specificity as to what they seek. Defendants merely state that they seek "documents and communications showing Defendants assisting in and

encouraging cooperation with the investigation." See, e.g., Defense Moving Brief at 40. For its part, Cognizant objects to any production.

The Court therefore respectfully recommends that the District Court order Cognizant to produce documents and communications wherein Defendants support the internal investigation. The Undersigned also recommends that the District Court require the parties to meet and confer on the appropriate parameters for the production. Counsel for Cognizant and Defendants are well familiar with the scope of the internal investigation and the Defendants' roles and actions within it. They should have a strong appreciation for what documents and communications actually or likely exist and the relative pertinence of those documents and communications to the Defendants' actions and statements during the internal investigation.

To assist the parties in their meet-and-confer, the Undersigned offers the following guidance. First, the Defendants' involvement in the investigation is necessarily finite. The investigation incepted in early 2016, and Defendants' involvement with it ceased on or around August 20, 2016. That relatively narrow period of time should form the date range for the documents to be searched for and produced.

Second, there is little utility in requiring

Cognizant to produce even the most ministerial emails or communications. If, for example, Defendant Schwartz or Defendant Coburn merely forwarded an email concerning the investigation to someone else, without meaningful comment, involvement, or follow-up activity reflected in that email, the Court would not expect Cognizant to provide that forwarding email. Such an email has little probative value, and, therefore, would not satisfy the "ought in all fairness be considered" prong of Rule 502(a). See also In re Teleglobe Communications Corp., 493 F.3d at 361 ("extending the waiver, however, is not a punitive measure, so courts do not imply a broader waiver than necessary to ensure that all parties are treated fairly.").

On the other hand, emails or other documents or communications in which Defendant Schwartz or Defendant Coburn took material measures to actively support or coordinate the activities of the internal investigation, or directed other officers or employees to do so, should be produced. Therefore, to the extent Cognizant possesses directives from Schwartz or Coburn, directing employees to cooperate with the investigators, or coordinating the gathering of information required by the investigators, or updating the Audit Committee or other pertinent Cognizant officers of status of the investigation, Cognizant should be required to produce that information to the Defendants.

That constitutes the Report and Recommendation of the Court. A written recommendation will issue.

(Conclusion of proceedings)

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 83 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

S/ *Sara L. Kern* 18th of August, 2023

Signature of Approved Transcriber Date

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